

RE: Rule 3-110
8/27-28/04 Commission Meeting
Open Session Item III.L.

-----Original Message-----

From: Vapnek, Paul W. [mailto:pwvapnek@townsend.com]

Sent: Monday, August 02, 2004 12:10 PM

To: McCurdy, Lauren

Cc: pecklaw@prodigy.net; Ignazio J. Ruvolo (E-mail)

Subject: Rule 3-110 Competence

With apologies to my co-drafters, I am submitting this brief memo for inclusion in the materials for our two day meeting in Los Angeles. The comparison chart sent to the Commission by Randy last Friday should be attached to the Agenda materials, along with a clean copy of current Rule 3-110 and of Model Rule 1.1 and its full complement of comments. The memo follows:

Having reviewed the comparison chart prepared for us, and compared our current rule with the Model Rule, I am satisfied that our rule is better and recommend no substantive changes. The duty of competence is also included in the Restatement (Restatement of the Law Third, The Law Governing Lawyers) Section 16: "To the extent consistent with the lawyer's other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation: (2) act with reasonable competence and diligence;"

The California rule is more restrictive than the Model Rule because it includes the requirement of intentional, reckless or repeated failure to act competently, not just a single instance of incompetent (or negligent) representation. The California discipline cases typically cover "gross negligence," "extreme negligence," and "persistent disregard of an attorney's duty to his clients," not "mere ignorance of the law in conducting the affairs of his client in good faith."

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CURRENT CALIFORNIA RULE 3-110

Rule 3-110. Failing to Act Competently.

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

Rule 1.1 of the ABA Model Rules of Professional Conduct

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

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(August 2, 2004)

Rule 3-110. Failing to Act Competently

1. Rule Amendment History
2. Office of Chief Trial Counsel Comments

NOTE: Refer to comment no. 2002-01 (Herbert Hutchinson), no. 2002-08 (Toby Johnson), no. 2003-35 (Nancy Yeend), and no. 2003-36 (Renee Sterling) included in the clear public comment binder.

RULE AMENDMENT HISTORY (2004)

Rule 3-110. Financial Arrangements Among Lawyers

Current Rule

Rule 3-110. Failing to Act Competently

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. (Amended by order of Supreme Court, operative September 14, 1992.)

RULE AMENDMENT HISTORY (2004)

Amendments Operative 1992 (Comparison of Current Rule to 1989 Rule)

Rule 3-110. Failing to Act Competently

(A) A member shall not intentionally, ~~or with reckless disregard~~ recklessly, or repeatedly fail to perform legal services ~~competently~~ with competence.

(B) ~~To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation. For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member ay nonetheless perform such duties competently by associating or, where appropriate, professionally consulting another member reasonable believed to be competent, or by acquiring sufficient learning and skill before performance is required, if the member has sufficient time, resources, and ability to do so.~~

(C) ~~As used i this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services. If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.~~

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Trousil v. State Bar* (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; *Palomo v. State Bar* (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; *Crane v. State Bar* (1981) 30 Cal.3d 117, 122; *Black v. State Bar* (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; *Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; *Moore v. State Bar* (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances.

RULE AMENDMENT HISTORY (2004)

Summary of 1992 Amendments

Proposed amendment to paragraph (A) is intended to achieve greater brevity and clarity. No substantive change is intended.

Proposed amendment to paragraph (B) would define the term "competence" rather than the phrase "to perform legal services competently" and incorporate the term "ability" found in current paragraph (C) into the definition. In addition, the second sentence of current paragraph (B) would be moved to amended paragraph (C).

The language in current paragraph (C) would be deleted and the concept of "ability" incorporated into the proposed definition of "competence." The new language would be taken from the second sentence of current paragraph (B) and rephrased to remove a perceived redundancy regarding the "learning and skill" component of "ability" as "ability" is used in current paragraph (B) and defined in current paragraph (C).

Proposed paragraph two of the Discussion section is entirely new and would create a limited exception to the rule for emergency situations. It is derived from the Comment to ABA Model Rule 1.1.

[December, 1991 green bound rule filing at page 13]

RULE AMENDMENT HISTORY (2004)

Amendments Operative 1989 (Comparison of 1989 Rule to Former Rule 6-101)

Rule 3-110, ~~6-101~~: Failing to Act Competently.

(A) ~~(1) Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation.~~

~~(2) A member of the State Bar shall not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently.~~

~~(B) To perform legal services competently means diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation. If the member does not have sufficient learning and skills when the employment or representation is undertaken, or during the course of the employment or representation, the member may nonetheless perform such duties competently by associating unless the member associates or, where appropriate, professionally consults consulting another lawyer who the member reasonably believed to be believes is competent, a member of the State Bar shall not or by acquiring sufficient learning and skill~~

~~(1) Accept employment or continue representation in a legal matter when the member knows that the member does not have, or will not acquire before performance is required, if the member has sufficient time, resources, and ability to, perform the matter with competence, or do so.~~

~~(2) Repeatedly accept employment or continue representation in legal matters when the member reasonable should know that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence.~~

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally, and physically able to perform legal services.

Discussion:

The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorney and non-attorney employees or agents. (See, e.g., Waysman v. State Bar (1986) 41 Cal.3d 452; Trousil v. State Bar (1985) 38 Cal.3d 337, 342 [211 Cal.Rptr. 525]; Palomo v. State Bar (1984) 36 Cal.3d 785 [205 Cal.Rptr. 834]; Crane v. State Bar (1981) 30 Cal.3d 117, 122; Black v. State Bar (1972) 7 Cal.3d 676, 692 [103 Cal.Rptr. 288; 499 P.2d 968]; Vaughn v. State Bar (1972) 6 Cal.3d 847, 857-858 [100 Cal.Rptr. 713; 494 P.2d 1257]; Moore v. State Bar (1964) 62 Cal.2d 74, 81 [41 Cal.Rptr. 161; 396 P.2d 577].)

Summary of 1989 Amendments

Paragraph (A) continues the prohibitions on failing to act competently found in current rule 6-101(A)(2).

RULE AMENDMENT HISTORY (2004)

Paragraph (B) is derived from current rule 6-101(A)(1) and (B). It is intended to define competence.

No changes are proposed to paragraph (C), which defines “ability”.

[December, 1987 grey bound rule filing at pg. 31]

Rule as Adopted Operative October 21, 1983 (Former Rule 6-101) (Comparison of 10/21/83 Rule to 1/1/75 Rule)

Rule 6-101. Failing to Act Competently

~~— A member of the State Bar shall not willfully or habitually~~

~~(1) Perform legal services for a client or clients if he knows or reasonably should know that he does not possess the learning and skill ordinarily possessed by lawyers in good standing who perform, but do not specialize in, similar services practicing in the same or similar locality and under similar circumstances unless he associates or, where appropriate, professionally consults another lawyer and who he reasonably believes does possess the requisite learning and skill;~~

~~(2) Fail to use reasonable diligence and his best judgment in the exercise of his skill and in the application of his learning in an effort to accomplish, with reasonable speed, the purpose of which he is employed.~~

~~— The good faith of an attorney is a matter to be considered in determining whether the acts done through ignorance or mistake warrant imposition of discipline under Rule 6-101.~~

1. (1) Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation.

(2) A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.

(B) Unless the member associates or, where appropriate, professionally consults another lawyer who the member reasonably believes is competent, a member of the State Bar shall not

(1) Accept employment or continue representation in a legal matter when the member knows that the member does not have, sufficient time, resources an ability to, perform the matter with competence, or

(2) Repeatedly accept employment or continue representation in legal matters when the member reasonably should know that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to perform the matters with competence.

RULE AMENDMENT HISTORY (2004)

(C) As used in this rule, the term “ability” means a quality or state of having sufficient learning and skill and being mentally, emotional and physically able, to perform legal services.

Excerpt from August 11, 1983 Supreme Court Rule Filing

III. Conclusion

Proposed rule 6-101 differs from present rule 6-101 (see enclosure 14) in several unique and distinctive ways:

1. For the first time, rule 6-101 includes a definition of attorney competence. (See enclosure 1, subdivision (A)(1), lines 22 -25.)
2. The rule’s definition of competence focuses upon whether or not the lawyer has performed legal services o behalf of the client competently rather than upon innate or inherent abilities, skills or qualities. The rule provides for an examination of an attorney’s conduct ad actions, rather than an attorney’s intent, i the performance of legal services.
3. Proposed rule 6-101 (A)(2) sets forth a standard for discipline: a lawyer may be disciplined when he or she intentionally, repeatedly or with reckless disregard fails to perform legal services competently. (See enclosure 1, lines 27-29.)

For the first time the rule introduces into the Rules of Professional Conduct a standard for discipline based on reckless disregard. (See enclosure 1, lines 27-28.)

4. The proposed rule clarifies the circumstances under which a member may accept or continue representation in legal matters.
 - a. Proposed subdivision (B)(1) (see enclosure 1, lines 31-39) provides that a member may be disciplined when:

(1) The member knows at the time of acceptance or continuation of employment that he or she

(a) is not competent to handle a matter, or

RULE AMENDMENT HISTORY (2004)

(b) will not acquire sufficient time, resources or ability to perform the matter with requisite competence prior to the time performance is required; and

(2) The member does not associate or professionally consult another lawyer whom the member believes is competent.

b. Proposed subdivision (B)(2) (see enclosure 1, lines 31-33, 41-45) provides that a member may be disciplined when:

(1) The member repeatedly accepts employment or continues representation in legal matters when the member reasonably should know that he or she

(a) is not competent to handle the matters, or

(b) will not acquire sufficient time, resources or ability to perform the matter with requisite competence prior to the time performance is required; and

(2) The member does not associate or professionally consult another lawyer whom the member believes is competent.

5. Present rule 6-101 provides that the good faith of an attorney is a matter to be considered in determining whether acts done through ignorance or mistake warrant the imposition of discipline. This concept has been deleted from the proposed rule as unnecessary because the good faith of an attorney may always be taken into account in determining the nature and extent of discipline.

The proposed revisions have been the product of a long process of review, revision, comment and dialogue between members of the Board of Governors, State Bar committees and sections, other organized Bar entities, and members of the public. They are responsive to the need for a definition of attorney competence in the context of a standard which is enforceable in attorney disciplinary and other regulatory proceedings, and to the need for a standard of competence for the determination of an attorney's fitness to practice. It is respectfully submitted that proposed revisions to rule 6-101 should be approved by this Court.

[August, 1983 red bound rule filing at pg. 4]

RULE AMENDMENT HISTORY (2004)

Excerpt from 1972 Final Report of the Special Committee to Study the ABA Code of Professional Responsibility (Proposed Rule 6-101)

Rule 6-101. Failing to Act Competently.

A member of the State Bar shall not:

(1) Handle a legal matter which he is not competent to handle, without associating with him a lawyer who is competent to handle it; however, he may accept employment relative to such matter if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client.

(2) Handle a legal matter without such preparation as he knows or should know to be required in the circumstances.

(3) Neglect to take those steps which he knows or should know to be required for the handling of a legal matter entrusted to him.

Comment: At present, the primary California authority providing for discipline of “incompetent” members of the State Bar is cases law. Discipline has been imposed in the past for persistent or “habitual disregard” by an attorney of his client’s interests.

In *Ridley v. State Bar* (1972) 6 C.3d 551, it is said at 560:

“Habitual disregard by an attorney of the interests of clients is ground for disbarment under Business and Professions Code Section 6103 and 6106. Even when such neglect is grossly negligent or careless, rather than willful and dishonest, it is an act of moral turpitude and professional misconduct, justifying disbarment.: (Emp. added). See also Simmons v. State Bar (1070) 2 C.3d 719, 729; Grove v. State Bar (1967) 66 C.2d 680, 683-684.

The California Supreme Court has also pointed out that the good faith of an attorney can be a defense to a disciplinary proceeding based on allegedly “incompetent” actions. In *Call v. State Bar* (1955) 45 C.2d 104, it is said (at 111):

“[5] An attorney may be disciplined for a violation of his oath to discharge his duties to the best of his knowledge and ability, but mere ignorance of that law in conducting the affairs of a client in good faith is not cause for discipline. (Business and Professions Code, §§6087 and 6103; see Friday v. State Bar 23 Cal.2d 501, 505) [6] The good faith of an attorney is a matter to be considered in determining

whether discipline should be imposed for acts done through ignorance or mistake.
(See In re Kling, 44 Cal.App. 267, 271 [186 P. 152].)”

Proposed Rule 6-101 is designed to place in the Rules of Professional Conduct certain standards of care for the protection of the public in an attorney’s handling of a legal matter. Although Rule 6-101 has been generally patterned after ABA Code to the provision to better reflect the good faith principles stated by the Supreme Court of California.

(Note: The version of proposed rule 6-101 as set forth above differs from the version adopted by the Supreme Court operative 1/1/75.)

Excerpt from September 27, 2001 Memorandum

DATE: September 27, 2001

TO: The Commission for the Revision of the Rules of Professional Conduct

FROM: Mike Nisperos, Jr., Chief Trial Counsel

SUBJECT: Recommendations for Changes to the Rules of Professional Conduct

14. Rule 3-110. Failing to Act Competently

OCTC's recommends adding to the definition of competent representation and making it clear that reasonable diligence and prompt representation are required by this rule. The discussion section clarifies the definition of the word "repeated."

OCTC proposes the following revisions:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

(B) For purposes of this rule "competence" in any legal service shall mean to apply 1) diligence, 2) leaning and skill, ~~and~~ 3) mental, emotional, and physical ability reasonably necessary for the performance of such service; 4) thoroughness, and 5) preparation reasonably necessary for the representation.

(C) A member shall act with reasonable diligence and promptness in representing a client. A member shall make reasonable efforts to expedite litigation consistent with the interests of the client.

(E) (D) A member shall not represent a client when the member does not have sufficient time, resources, or current learning and skill to perform the services. If a member does not have sufficient current learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with, or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient current learning and skill before performance is required.

Discussion:

...

As used in this rule the word repeated does not require that the conduct be repeated in a single client matter, but may be repeated conduct in the aggregate when several client matters are considered or taken together. As such, a repeated failure to perform legal services competently may occur when the member fails to do a certain act in connection with the representation of several or multiple clients. For example, it could constitute a repeated failure to perform legal services competently for a member to fail to file civil complaints on behalf of several or multiple clients prior to the expiration of the statute of limitations.

A member has the obligation to keep current in the law, to be diligent and act promptly on behalf of his or her client. An attorney must use his best efforts to accomplish with reasonable speed the purpose for which he was employed. (Butler v. State Bar (1986) 42 Cal.3d 323, 328.) A member should, therefore, not take a case if the member does not have the time, resources, or current learning and skill to perform the services properly, subject to the exceptions provided in the rule. (See In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 684).

OCTC COMMENTS:

OCTC recommends some changes to the language of the rule and in the discussion. It is believed these recommendations do not change the law but, instead, state more precisely what the law is, as interpreted by the courts. However, there has been some difference of opinion among the judges as to whether a repeated failure to perform competently must occur within a single client matter in order to constitute a violation of the rule or may be the result from a failure to do the same act on behalf of separate clients. The proposed changes would make it clear that several acts involving separate clients may be taken together where appropriate to establish a violation of the rule.